

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Jenzo Duque	Team: Squad #8	CCRB Case #: 201809012	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Monday, 10/22/2018 4:38 AM	Location of Incident: In front of 107 Chambers Street	Precinct: 01	18 Mo. SOL 4/22/2020	EO SOL 12/7/2020	
Date/Time CV Reported Mon, 10/22/2018 6:20 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 10/29/2018 10:59 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Hugh Herbert	01343	930337	001 PCT
2. POM Dennis Burgos	25416	949929	103 PCT
3. Officers			001 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Dennis Burgos	Discourtesy: Police Officer Dennis Burgos spoke discourteously to § 87(2)(b)	
B.POM Dennis Burgos	Force: Police Officer Dennis Burgos used a taser against § 87(2)(b)	
C.POM Hugh Herbert	Force: Police Officer Hugh Herbert pointed his gun at § 87(2)(b)	
D.POM Hugh Herbert	Force: Police Officer Hugh Herbert used physical force against § 87(2)(b)	
E.POM Hugh Herbert	Force: Police Officer Hugh Herbert used pepper spray against § 87(2)(b)	
F.POM Dennis Burgos	Force: Police Officer Dennis Burgos used physical force against § 87(2)(b)	
G.POM Hugh Herbert	Force: Police Officer Hugh Herbert used physical force against § 87(2)(b)	
H.POM Dennis Burgos	Force: Police Officer Dennis Burgos used a taser against § 87(2)(b)	
I.POM Dennis Burgos	Discourtesy: Police Officer Dennis Burgos spoke discourteously to § 87(2)(b)	
J.POM Hugh Herbert	Discourtesy: Police Officer Hugh Herbert spoke discourteously to § 87(2)(b)	
K.POM Dennis Burgos	Force: Police Officer Dennis Burgos used physical force against § 87(2)(b)	
L.POM Hugh Herbert	Force: Police Officer Hugh Herbert used physical force against § 87(2)(b)	
M.POM Dennis Burgos	Force: Police Officer Dennis Burgos used a taser against § 87(2)(b)	
N.POM Dennis Burgos	Discourtesy: Police Officer Dennis Burgos spoke discourteously to § 87(2)(b)	
O.POM Hugh Herbert	Discourtesy: Police Officer Hugh Herbert spoke discourteously to § 87(2)(b)	

Officer(s)	Allegation	Investigator Recommendation
P. Officers	Discourtesy: Officers spoke discourteously to § 87(2)(b)	

Case Summary

Sergeant David Ho of the 1st Pct. filed this complaint with IAB and on behalf of § 87(2)(b) under IAB Log #2018-41775, on October 22, 2018. IAB referred the complaint to the CCRB on October 29, 2018.

On October 22, 2018, at approximately 1:30 a.m., near West Broadway Avenue and Chambers Street in Manhattan, Police Officer Dennis Burgos and Police Officer Hugh Herbert of the 1st Precinct sat in their stationary vehicle when § 87(2)(b) approached them. § 87(2)(b) spat on the officers' vehicle and stated he had a question; the officers engaged with him verbally for some minutes before commanding him to leave the area. § 87(2)(b) began to leave the location but then stopped in the street while still speaking with the officers. PO Burgos then commanded § 87(2)(b) to, "Get out the fucking street," and to "Get to the fucking sidewalk" (**Allegation A: Discourtesy:** § 87(2)(g) § 87(2)(b)) then left the immediate vicinity without incident.

At approximately 4:38 a.m., in front of 107 Chambers Street in Manhattan, PO Burgos and PO Herbert responded to a radio run of an assault in progress. The officers encountered § 87(2)(b) while driving to the location and they recognized him from the earlier encounter. § 87(2)(b) pointed westbound on Chambers Street and stated an individual in the vicinity possessed a firearm. The officers drove down the street and approached the individual, who stated they were the victim of the assault in progress. The victim then pointed back at § 87(2)(b) and stated he had stolen the victim's jacket. The officers then drove back to § 87(2)(b) and approached him. Upon exiting their vehicle, PO Burgos used his taser against § 87(2)(b) (**Allegation B: Force:** § 87(2)(g) § 87(2)(b)) and PO Herbert pointed his gun at § 87(2)(b) (**Allegation C: Force:** § 87(2)(g) § 87(2)(b)). PO Herbert then holstered his gun and kicked § 87(2)(b) (**Allegation D: Force:** § 87(2)(g) § 87(2)(b)). § 87(2)(b) backed away from the officers and PO Herbert pepper sprayed him (**Allegation E: Force:** § 87(2)(g) § 87(2)(b)). § 87(2)(b) slumped onto a raised ventilation grate and the officers then pulled him down onto the ground (**Allegations F-G: Force:** § 87(2)(g) § 87(2)(b)). The officers commanded § 87(2)(b) to place his hands behind his back, and when § 87(2)(b) did not comply, PO Burgos tasered him a second time (**Allegation H: Force:** § 87(2)(g) § 87(2)(b)). Contemporaneously, PO Burgos and PO Herbert commanded § 87(2)(b) to, "Put your fucking hands behind your back" (**Allegation I-J: Discourtesy:** § 87(2)(g) § 87(2)(b)). The officers continued to command § 87(2)(b) to place his hands behind his back, and when § 87(2)(b) did not comply, PO Burgos and PO Herbert punched him (**Allegations K-L: Force:** § 87(2)(g) § 87(2)(b)). The officers continued to command § 87(2)(b) to place his hands behind his back, and when § 87(2)(b) did not comply, PO Burgos tasered him a third time (**Allegation M: Force:** § 87(2)(g) § 87(2)(b)). During § 87(2)(b)'s physical apprehension, PO Herbert called for backup, and approximately eight to ten uniformed officers responded from his command. Approximately three to four of the officers aided PO Burgos and PO Herbert in restraining § 87(2)(b). § 87(2)(b) was then successfully handcuffed. For the duration of time between § 87(2)(b)'s successful handcuffing and his removal to the hospital, PO Burgos and PO Herbert told him, "Shut the fuck up," "Stop fucking moving—Don't fucking move," "Shut your fucking mouth," "I don't give a fuck," "Keep your fucking head down," and "That was the actual taser—when I shoved it in your ass." (**Allegation N-O: Discourtesy:** § 87(2)(g) § 87(2)(b)). Other officers on scene also told § 87(2)(b) "Shut the fuck up, dickhead," and "Shut the fuck up" (**Allegation P: Discourtesy:** § 87(2)(g) § 87(2)(b)).

There were 11 body-worn camera videos available for this incident (Board Review 28-38). § 87(2)(b) was arrested as a result of this incident.

Findings and Recommendations

Allegation (A): Discourtesy: Police Officer Dennis Burgos spoke discourteously to § 87(2)(b)

It is undisputed that PO Burgos spoke discourteously to § 87(2)(b). § 87(2)(b) could not be reached to provide statements regarding this incident.

Given that the circumstances of § 87(2)(b)'s arrest are documented in his Complaint Report (Board Review 22), Arrest Report (Board Review 23), Threat Resistance and Injury reports (Board Review 24) (Board Review 25), Investigating Supervisor's Assessment Report (Board Review 41), Police Radio Communications (Board Review 12), Medical Treatment of Prisoner Report (Board Review 26), and X-26 Data Sheet (Board Review 27), the circumstances of his arrest are not in dispute.

In PO Burgos's statement to the CCRB (Board Review 17), PO Burgos and PO Herbert sat in their stationary vehicle when § 87(2)(b) approached the vehicle and yelled, "You faggots—you wanna fucking fight?" to the officers and then spit onto the hood of the vehicle. PO Burgos and PO Herbert then exited the vehicle, and PO Burgos triggered his body-worn camera. Upon exiting the vehicle, PO Burgos asked § 87(2)(b) if he needed help and what was going on. PO Burgos repeated § 87(2)(b)'s statements back to him and § 87(2)(b) denied addressing the officers in the first place. § 87(2)(b) kept his left hand around his waistband and his left pants-pocket for a majority of the interaction. When asked if § 87(2)(b) did anything with his left hand specifically, PO Burgos stated § 87(2)(b)'s left hand appeared to be guarding something. PO Burgos did not observe any objects on § 87(2)(b)'s person.

The officers then told § 87(2)(b) to leave, as PO Burgos believed § 87(2)(b) wanted to fight. The officers told § 87(2)(b) to cross the street and enter the nearby subway station. PO Burgos estimated that he issued commands to § 87(2)(b) more than five but less than 10 times. After an unspecified amount of time, § 87(2)(b) then left the location of his own free will, and entered the nearby subway station. PO Burgos estimated the officers interacted with § 87(2)(b) for approximately two to five minutes. PO Burgos suspected § 87(2)(b) could have been under the influence of alcohol or drugs based on their interaction. PO Burgos could not specify what intoxicant or narcotic he believed § 87(2)(b) to be under the influence of upon request.

PO Burgos was shown his body-worn camera for this incident (Board Review 29). PO Burgos recalled directing profanity at § 87(2)(b) independently of the video footage. When asked why he directed profanity at § 87(2)(b) PO Burgos stated § 87(2)(b) did not respond to his commands prior to directing profanity at him. PO Burgos added that in his experience interacting with civilians, he received a better response when using a more serious and assertive approach to his language. PO Burgos did not recall how long he had been interacting with § 87(2)(b) prior to directing profanity at him.

PO Herbert provided a generally consistent statement with PO Burgos (Board Review 18).

In PO Burgos's body-worn camera video footage (Board Review 01), PO Burgos approaches § 87(2)(b) and states, "You just spit on my car and said, 'Let me talk to you faggots,'" to § 87(2)(b). § 87(2)(b) responds that the spit did not touch the officers' vehicle. § 87(2)(b) holds his left hand near his left-pants pocket while speaking with PO Burgos and PO Herbert. § 87(2)(b) states the officers cannot help him and the officers ask him what help he

needs. § 87(2)(b) asks the officers if they consider him a threat and PO Burgos affirms that § 87(2)(b) is a threat. Approximately 40 seconds into the video footage, PO Herbert tells § 87(2)(b) to leave and he begins walking into the street. At approximately one minute into the video footage, PO Burgos tells § 87(2)(b) to get out of the street because the traffic light is green. PO Burgos commands § 87(2)(b) to get out of the street three times and begins walking towards him. § 87(2)(b) continues to stand in the street and blocks vehicular traffic from driving through the intersection. § 87(2)(b) is stationary in the street for approximately 20 seconds, and PO Burgos then states, “Get out of the fucking street, dude.” PO Burgos commands § 87(2)(b) to get out of the street twice more. § 87(2)(b) responds that he is complying with their commands. PO Burgos then states, “So get to the fucking sidewalk,” to § 87(2)(b). § 87(2)(b) states he is talking with the officers in the street and that is why he is stationary. PO Burgos responds that they should speak on the sidewalk. § 87(2)(b) then answers he is done speaking with the officers and he moves to the sidewalk. § 87(2)(b) and the officers speak for approximately 40 more seconds and then § 87(2)(b) walks away.

Patrol Guide Procedure 203-09 regarding Public Contact (Board Review 10), states officers should interact with members of the public in a professional and courteous matter.

DAO-DCT Case Number 2017-17276 (Board Review 11), states that profane remarks, made during stressful violent confrontations or while an officer is trying to gain control of a chaotic situation, are not misconduct.

§ 87(2)(g)

[REDACTED]

Allegation B: Force: Police Officer Dennis Burgos used a taser against § 87(2)(b)

Allegation C: Force: Police Officer Hugh Herbert pointed his gun at § 87(2)(b)

It is undisputed that PO Burgos tasered § 87(2)(b)

It is undisputed that PO Herbert pointed his gun at § 87(2)(b)

In PO Burgos’s statement to the CCRB (Board Review 17), PO Burgos and PO Herbert received a radio run for a robbery in progress. The radio run included a description: male, black, wearing a red jacket. PO Burgos did not recall if the radio run specified that injuries were sustained in the robbery. PO Burgos did not recall if the radio run specified assault or physical violence between parties. The description matched that of § 87(2)(b) whom PO Burgos recalled from the earlier interaction that same tour. PO Burgos recalled the “red sweatshirt” § 87(2)(b) had been wearing, and stated that he recalled observing only one individual who matched the description. PO Burgos stated § 87(2)(b) stood approximately 5’9” tall and was middle-aged, but he could not gauge his build due to the jacket he was wearing.

PO Burgos and PO Herbert responded to the radio run and drove to the location. While driving to the location, § 87(2)(b) flagged the officers down. The officers spoke with § 87(2)(b) who pointed westbound on Chambers Street and stated an individual down the street

committed the robbery and had a gun. PO Burgos and PO Herbert drove down the street and encountered the individual whom § 87(2)(b) pointed to, the victim of the robbery. The victim pointed back at § 87(2)(b) and stated he had robbed the victim of his jacket. The officers then drove back to where they encountered § 87(2)(b) in front of 107 Chambers Street.

PO Burgos and PO Herbert exited their vehicle, and approached § 87(2)(b) while issuing commands to show the officers his hands. PO Herbert drew his firearm upon exiting the vehicle. The officers stood in a triangle or a V-formation, with § 87(2)(b) at the V's intersecting lines. PO Burgos did not recall how many times he commanded § 87(2)(b) to show him his hands. § 87(2)(b) had his hands near his waistband by his front pants-pockets. § 87(2)(b) also took a step back, which PO Burgos described as a fighting stance. § 87(2)(b) dropped his right foot back and adopted a boxing stance while blading his body. § 87(2)(b)'s hands were around his waistband at the time that he adopted the stance. § 87(2)(b) did not otherwise respond to PO Burgos's commands. § 87(2)(b) did not do anything else that PO Burgos categorized as aggressive behavior towards himself and PO Herbert. PO Burgos did not recall any statements § 87(2)(b) made at that point in time. When asked if § 87(2)(b) tried to flee, PO Burgos stated that § 87(2)(b) was not stationary until the officers exited the vehicle, and he was stationary upon their approach. PO Burgos was concerned that § 87(2)(b) would injure him or PO Herbert. PO Burgos was not concerned that § 87(2)(b) would injure himself or anyone other than the officers.

PO Burgos then pointed his taser and flashlight at § 87(2)(b) while commanding him to show his hands. § 87(2)(b) hesitated to place his hands in the air. PO Burgos then deployed his taser at § 87(2)(b) as he felt § 87(2)(b) to be a threat to his safety at that point in time. PO Burgos did not know what happened with the taser prongs, as he observed that the taser was not effective, because § 87(2)(b) did not respond to the taser deployment. PO Burgos stated he suspected § 87(2)(b) of being an emotionally disturbed person based on his non-compliance and lack of response to the taser deployment. PO Burgos was shown his body-worn camera video footage (Board Review 29), from 00:00 to 00:30. PO Burgos stated the video footage refreshed his recollection of the incident. PO Burgos stated that by the 00:14 mark of the video footage, he tasered § 87(2)(b) and he knew so because he recalled such.

PO Herbert provided a somewhat consistent statement with PO Burgos (Board Review 18). The officers received a radio run for an Assault in Progress. PO Herbert exited the vehicle and approached § 87(2)(b) who had his right hand inside his right front-pants pocket. PO Herbert told § 87(2)(b) to remove his hands from his pocket and § 87(2)(b) did not comply. PO Herbert estimated he commanded § 87(2)(b) to remove his hands from his pocket a couple of times. § 87(2)(b) did nothing else physically that led PO Herbert to perceive him as a threat to his safety. The previous interaction that same tour, § 87(2)(b)'s refusal to remove his hand from his pocket, and § 87(2)(b)'s false firearm report elevated PO Herbert's perception of § 87(2)(b) as a threat.

PO Herbert drew his firearm and pointed it at § 87(2)(b) while commanding him to remove his hands from his pocket. § 87(2)(b) did not comply and PO Burgos then deployed his taser at § 87(2)(b). PO Herbert did not recall whether PO Burgos deployed his taser before or after PO Herbert holstered his firearm. PO Herbert did not know where the taser prongs contacted § 87(2)(b)'s body specifically. PO Herbert did not suspect § 87(2)(b) of being an emotionally disturbed person.

In the police radio audio for this incident (Board Review 12), a 911 dispatcher states there is an event of a 10-34, an assault in progress outside 13 Hudson Street, and that a male

assaulted a female in sector C. Unit 1D (PO Burgos and PO Herbert) responds. The 911 dispatcher adds that a male assaulted a female, with the following description: male, black, red jacket, black pants, going towards Chambers about 6'0" tall. The dispatcher does not state any weapons were involved.

In PO Burgos's body-worn camera video footage (Board Review 02), which does not contain audio, PO Burgos drives the officers' vehicle and stops it at approximately eight seconds. At approximately 10 to 11 seconds, PO Burgos exits the police vehicle and points his taser at § 87(2)(b). At approximately 12 to 13 seconds, PO Herbert draws his firearm and points it at § 87(2)(b). § 87(2)(b) is stationary as the officers approach with their respective devices drawn. § 87(2)(b)'s arms are fully extended outward from his body and parallel to the ground. § 87(2)(b)'s arms do not move towards his waistband or any other part of his body. PO Herbert begins to holster his firearm at the end of the video footage.

Both PO Burgos's and PO Herbert's Threat Resistance and Injury Reports are consistent with their testimony (Board Review 24) (Board Review 25).

The Investigating Supervisor's Assessment Report for this incident is consistent with the officers' testimony (Board Review 41). However, the report notes that the body-worn camera video footage is difficult to review clearly, and that despite concluding the officers' usage of force followed Department regulations, further review is recommended to another investigative unit of the Internal Affairs Bureau.

Patrol Guide Procedure 221-01 regarding Force Guidelines (Board Review 13), states, "MOS will use only the reasonable force necessary to gain control or custody of a subject." The following factors should be taken into consideration when determining that force is reasonable under the totality of the circumstances: "the nature and severity of the crime/circumstances, actions taken by the subject, duration of the action, immediacy of the perceived threat or harm to the subject, members of the service, and/or bystanders, whether the subject is actively resisting custody, whether the subject is attempting to evade arrest by flight, number of subjects in comparison to the MOS, size, age, and condition of the subject in comparison to the MOS, subject's violent history if known, presence of hostile crowd or agitators, and subject apparently under the influence of a stimulant/narcotic which would affect pain tolerance or increase the likelihood of violence."

PG 221-01 also notes, "The decision to display or draw a firearm should be based on an articulable belief that the potential for serious physical injury is present. When a uniformed member of the service determines that the potential for serious physical injury is no longer present, the uniformed member of the service will holster the firearm as soon as practicable."

Patrol Guide 221-02 regarding Use of Force (Board Review 14), defines active resisting as, "physically evasive movements to defeat a member of the service's attempt at control, including bracing, tensing, pushing or verbally signaling an intention to avoid or prevent being taken into or retained in custody." The procedure defines passive resistance as, "minimal physical action to prevent a member from performing their lawful duty. For example, a subject failing to comply with a lawful command and stands motionless and/or a subject going limp when being taken into custody." The procedure further notes, "MOS should consider whether a subject's lack of compliance is a deliberate attempt to resist, or alternatively, an inability to comply, resulting from factors including, but not limited to, medical condition, mental impairment, developmental disability, physical limitation, language barrier, and/or drug interaction.

PG 221-02 subsection 7-10 also states, "Comply with PG 221-13, 'Mentally Ill or Emotionally Disturbed Persons,' if the subject is acting in a manner that would lead a member of

service to believe that the subject is emotionally disturbed or under the influence of a mind-altering substance. Assume command of the incident and coordinate the use of de-escalation techniques, if appropriate and consistent with officer safety. Direct tactics to minimize the possibility of injury to members of the service, the subject, or bystanders. If the use of de-escalation and conflict negotiation techniques fail to persuade an uncooperative subject to cooperate, the supervisor/members of the service should if appropriate and consistent with officer safety: advise the offender that they will be charged with the additional offense of resisting arrest. Devise a tactical plan with members present to restrain the subject while minimizing the possibility of injury to members of the service, the subject, and bystanders. Advise the offender that physical force or other device (e.g., OC pepper spray, shield, baton/asp, etc.) will be used to handcuff/restrain them before applying such force, if appropriate.” PG 221-02 also notes, “Members of the service should not use OC pepper spray, Conducted Electrical Weapon, or impact weapons on persons who are passively resisting.”

Patrol Guide Procedure 221-08 regarding Use of Conducted Electrical Weapons (Board Review 15), states the same factors in PG 221-01 should be taken into consideration when determining that CEW usage is reasonable under the totality of the circumstances. The procedure also notes, “CEWs should only be used against persons who are actively resisting, exhibiting active aggression or to prevent individuals from physically injuring themselves or other person(s) actually present.”

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

§ 87(2)(g)

[REDACTED]

§ 87(2)(g)

[REDACTED]

Allegation D: Force: Police Officer Hugh Herbert used physical force against § 87(2)(b)

It is undisputed that PO Herbert used physical force against § 87(2)(b). In PO Herbert's statement to the CCRB (Board Review 18), after PO Burgos tasered § 87(2)(b) took a few steps towards PO Burgos, and then took some steps back. PO Herbert approached § 87(2)(b) and kicked him in his groin area. PO Herbert did not warn § 87(2)(b) that he would kick him. PO Herbert stated he was not concerned with issuing commands to § 87(2)(b) at that point in time, as his focus was controlling § 87(2)(b) to prevent injury to himself and PO Burgos. § 87(2)(b) took some steps back from the officers after being kicked.

PO Burgos provided a consistent statement with PO Herbert (Board Review 17). PO Burgos stated § 87(2)(b)'s lack of a response to his taser deployment further elevated his suspicion that § 87(2)(b) was under the influence of intoxicants or drugs. PO Burgos stated the same lack of response to the kick further elevated his suspicion that § 87(2)(b) of being an emotionally disturbed person.

In PO Burgos's body-worn camera video footage (Board Review 03), which does not contain audio, § 87(2)(b) continues to stand in place with his arms fully extended outward from his body and parallel to the ground. PO Burgos continues to point his taser at § 87(2)(b) as PO Herbert holsters his firearm. PO Herbert then takes four steps towards § 87(2)(b).

turns towards PO Herbert with his arms still extended outward and otherwise makes no sudden movements. Approximately four seconds have passed between when PO Herbert holsters his firearm and when § 87(2)(b) turns to face PO Herbert. PO Burgos then takes a step towards § 87(2)(b) and § 87(2)(b) turns towards him, with his arms still extended outward. PO Herbert then kicks § 87(2)(b) while he is facing away from PO Herbert. The video footage does not clearly depict whether the kick connects with § 87(2)(b) however, § 87(2)(b) reacts to the kick, backing away from PO Herbert. Approximately two to three seconds have passed between when PO Burgos steps towards § 87(2)(b) and when § 87(2)(b) reacts to PO Herbert's kick.

Patrol Guide Procedure 221-01 regarding Force Guidelines (Board Review 13), states, "MOS will use only the reasonable force necessary to gain control or custody of a subject."

As noted above, at the time in which PO Burgos and PO Herbert first approached and used force against § 87(2)(b) was passively resisting arrest. In the six seconds following PO Herbert's decision to holster his firearm, § 87(2)(b) made no sudden movement towards the officers or his pockets/waistband, and continued to stand in place with his arms extended outward from his body. In fact, it is the officers who moved closer to § 87(2)(b) and he only moved in response to their actions, turning to face the respective officers as they closed the distance between them. As noted above, by nature of the holstering of his firearm, PO Herbert had concluded that § 87(2)(b) did not pose an immediate potential for serious physical injury.

The absence of an immediate potential for serious physical injury alone does not indicate that any usage of force against § 87(2)(b) at that point in time was excessive, as the force continuum is expected to evolve in concurrence with the totality of the circumstances. At the point in time in which PO Herbert kicked § 87(2)(b) PO Herbert should have factored in § 87(2)(b)'s level of resistance. The patrol guide procedures in place state that officers should factor whether a subject's lack of compliance is a deliberate attempt to resist arrest. § 87(2)(g)

§ 87(2)(g)

Allegation E: Force: Police Officer Hugh Herbert used pepper spray against § 87(2)(b)

It is undisputed that PO Herbert pepper-sprayed § 87(2)(b)

In PO Herbert's statement to the CCRB (Board Review 18), after PO Herbert kicked § 87(2)(b) took some steps back and away from the officers. § 87(2)(b) stood still in an aggressive posture. When asked to describe the aggressive posture, PO Herbert stated § 87(2)(b) stepped back while facing the officers and had his hands up, but continued to refuse to comply with the officers' commands. PO Herbert stated § 87(2)(b)'s hands were at chest level and positioned as though ready to grab, grapple, or strike the officers. PO Herbert then pepper-sprayed § 87(2)(b) in his face without warning him. PO Herbert pepper-sprayed § 87(2)(b) once. PO Herbert did not recall for how long he discharged his pepper-spray. § 87(2)(b) wiped at his face but otherwise did not seem affected by the pepper spray.

PO Burgos provided a generally consistent statement with PO Herbert (Board Review 17).

In PO Burgos's body-worn camera (Board Review 04), which does not contain audio, § 87(2)(b) backs away from PO Herbert after being kicked. Approximately two to three seconds have passed between when PO Burgos steps towards § 87(2)(b) and when § 87(2)(b) reacts to PO Herbert's kick. § 87(2)(b) takes a step back and his hands move towards his lower body. PO Herbert then shines a flash light in § 87(2)(b)'s face and he turns away from PO Herbert while backing up towards the wall behind him. Approximately two seconds after the kick, § 87(2)(b)'s back is towards the officers, and his arms are towards his front and waistband areas. § 87(2)(b) then turns around to face the officers and his hands are in distinct places: the right hand is near his waistband while his left arm is extended from his body with an upward open palm. Contemporaneously, § 87(2)(b) stumbles backward onto a vent in a sitting position. Approximately four to five seconds after the kick, PO Herbert pepper-sprays § 87(2)(b) slumps onto the vent and neither his hands nor his body are visible at that point in time.

Patrol Guide Procedure 221-07 regarding the Use of Oleoresin Capsicum Pepper Spray Devices (Board Review 16), states, "OC pepper spray will reduce or eliminate the need for physical force to effect an arrest or gain custody. It will often reduce the potential for injuries to members and suspects that may result from physical restraint and is should be regarded as a possible alternative to such force and restraint, where practical." The procedure further states, "In an effort to gain voluntary compliance, members of the service should advise the offender that OC pepper spray will be used to handcuff/restrain him/her before applying such force, if feasible." The procedure also notes, "Do not use OC pepper spray on subjects who passively resist (i.e., minimal physical action to prevent a member from performing their lawful duty)."

§ 87(2)(g)

It is undisputed that during approximately the first fifteen seconds of the encounter, § 87(2)(b) did not actively resist arrest or demonstrate active aggression. However, § 87(2)(b)'s movements after the kick factored into the evolving circumstances of the force continuum.

§ 87(2)(g)

§ 87(2)(g)

[REDACTED]

Allegation F: Force: Police Officer Dennis Burgos used physical force against § 87(2)(b)

Allegation G: Force: Police Officer Hugh Herbert used physical force against § 87(2)(b)

It is undisputed that PO Burgos and PO Herbert used physical force against § 87(2)(b). In PO Burgos's statement to the CCRB (Board Review 17), after PO Herbert pepper-sprayed § 87(2)(b), PO Burgos grabbed § 87(2)(b) below the waist area with both arms and pulled him to the ground. PO Burgos did not know if PO Herbert assisted in taking § 87(2)(b) down. § 87(2)(b) landed on his back.

PO Herbert provided a somewhat consistent statement with PO Burgos (Board Review 18). PO Herbert pulled § 87(2)(b) to the ground, but did not recall where he grabbed § 87(2)(b) specifically. PO Herbert did not recall if PO Burgos assisted him. PO Herbert did not recall § 87(2)(b)'s position when he landed on the ground.

In PO Burgos's body-worn camera video footage (Board Review 05), PO Herbert steps back after pepper-spraying § 87(2)(b), § 87(2)(b) slumps onto the vent and neither his hands nor his body are visible at that point in time. PO Burgos then triggers his body-worn camera. Approximately two seconds after PO Burgos triggers his body-worn camera, PO Burgos and PO Herbert grab § 87(2)(b) pulling him down onto the ground. The video footage contains audio, beginning approximately when PO Burgos and PO Herbert take § 87(2)(b) down. For approximately three seconds, PO Burgos and PO Herbert stand beside § 87(2)(b) while he lies on the ground. PO Burgos and PO Herbert both command § 87(2)(b) to get on the floor and put his hands behind his back at that point in time.

Because body-worn camera video footage corroborated that both officers used a forcible takedown against § 87(2)(b), the investigation is crediting that this happened.

Patrol Guide Procedure 221-01 regarding Force Guidelines (Board Review 13), states, "MOS will use only the reasonable force necessary to gain control or custody of a subject."

§ 87(2)(g)

[REDACTED]

Allegation H: Force: Police Officer Dennis Burgos used a taser against § 87(2)(b)

Allegation I: Discourtesy: Police Officer Dennis Burgos spoke discourteously to § 87(2)(b)

Allegation J: Discourtesy: Police Officer Hugh Herbert spoke discourteously to § 87(2)(b)

It is undisputed that PO Burgos tasered § 87(2)(b). It is undisputed that PO Burgos spoke discourteously to § 87(2)(b).

It is undisputed that PO Herbert spoke discourteously to § 87(2)(b).

In PO Burgos's statement to the CCRB (Board Review 17), after the officers pulled § 87(2)(b) down, § 87(2)(b) landed on his back and began wrestling from side to side while rotating his body, until he rotated onto his stomach. PO Burgos knelt beside the lower half of § 87(2)(b)'s body while PO Herbert knelt beside the upper half of § 87(2)(b)'s body. PO Burgos commanded § 87(2)(b) to place his hands behind his back and § 87(2)(b) did not comply. PO Burgos fumbled for his taser while wrestling with § 87(2)(b) on the ground. PO Burgos then removed the taser cartridge and used the taser in drive-stun mode against § 87(2)(b) pressing it against his lower back. § 87(2)(b) yelled out, but still did not give the officers his hands.

PO Burgos was shown his body-worn camera video footage for this incident (Board Review 29). PO Burgos recalled directing profanity towards § 87(2)(b) independently of the video footage. PO Burgos acknowledged hearing the profanity directed at § 87(2)(b) in the video footage and recognized the voice stating such as his own. PO Burgos stated his reason for directing profanity at § 87(2)(b) during his apprehension was the same as his previously stated reason, in that an assertive approach with his language elicits compliance.

PO Herbert provided a somewhat consistent statement with PO Burgos (Board Review 18). Once on the ground, the officers attempted to pull § 87(2)(b)'s hands behind his back to handcuff him. § 87(2)(b) pulled his hands towards his chest and away from the officers while lying on them. § 87(2)(b) pulled his hands underneath his body. PO Herbert did not recall if § 87(2)(b) moved or changed his body position while on the ground. PO Herbert continued to issue commands to § 87(2)(b) to give the officers his hands and § 87(2)(b) still did not comply. PO Herbert could not state with any certainty whether PO Burgos directed profanity towards § 87(2)(b) during his physical apprehension.

PO Herbert recalled directing profanity towards § 87(2)(b) during his physical apprehension. In substance, PO Herbert stated, "Put your fucking hands behind your back." When asked why he made this statement to § 87(2)(b), PO Herbert stated because § 87(2)(b) was not listening, and that civilians "listen better" when forcefully spoken to.

In PO Burgos's body-worn camera video footage (Board Review 06), after the officers use a forcible takedown against § 87(2)(b), PO Burgos commands him to, "Put your fucking hands behind your back." Both officers issue commands to § 87(2)(b) to place his hands behind his back more than once. PO Burgos then commands § 87(2)(b) to, "Put your hands behind your fucking back," as he activates his taser in drive-stun mode and kneels to press it against his lower body. PO Herbert kneels and grabs § 87(2)(b) after PO Burgos uses his taser. The video footage does not clearly depict what § 87(2)(b) is doing while on the ground at that point in time.

Both PO Burgos's and PO Herbert's Threat Resistance and Injury Reports are consistent with their testimony (Board Review 24) (Board Review 25).

The Investigating Supervisor's Assessment Report for this incident is consistent with the officers' testimony (Board Review 41). However, the report notes that the body-worn camera video footage is difficult to review clearly, and that despite concluding the officers' usage of force followed Department regulations, further review is recommended to another investigative unit of the Internal Affairs Bureau.

Patrol Guide Procedure 221-01 regarding Force Guidelines (Board Review 13), states, "MOS will use only the reasonable force necessary to gain control or custody of a subject."

DAO-DCT Case Number 2017-17276 (Board Review 11), states that profane remarks, made during stressful violent confrontations or while an officer is trying to gain control of a chaotic situation, are not misconduct.

Because the officers acknowledged directing profanity at § 87(2)(b) and video footage corroborated such, the investigation is crediting that this happened.

§ 87(2)(g)

Allegation K: Force: Police Officer Dennis Burgos used physical force against § 87(2)(b)

Allegation L: Force: Police Officer Hugh Herbert used physical force against § 87(2)(b)

Allegation M: Force: Police Officer Dennis Burgos used a taser against § 87(2)(b)

It is undisputed that PO Burgos used physical force against § 87(2)(b)

It is undisputed that PO Herbert used physical force against § 87(2)(b)

It is undisputed that PO Burgos tasered § 87(2)(b)

In PO Burgos's statement to the CCRB (Board Review 17), after taser[redacted] PO Burgos punched him. PO Burgos did not recall if PO Herbert punched [redacted] PO Burgos estimated he punched [redacted] more than 10 times. PO Burgos's punches contacted [redacted]'s torso and ribcage area. PO Burgos did not recall how [redacted]'s body was positioned while he punched him. PO Burgos continued to issue commands to [redacted] to place his hands behind his back and still [redacted] did not comply. [redacted] held his hands near his front waistband at that point in time.

After punching [redacted] and continuing to issue him commands, PO Burgos tasered [redacted] for a third time. [redacted] continued to hold his hands away from the officers. PO Burgos then punched [redacted] striking him in the body. [redacted] never complied with PO Burgos's commands, and PO Burgos wrestled [redacted]'s hands away from his body. PO Burgos then successfully handcuffed one of [redacted]'s wrists, but [redacted] continued to wrestle with the officers. PO Burgos punched [redacted] and then handcuffed the other wrist shortly thereafter.

PO Herbert provided a somewhat consistent statement with PO Burgos (Board Review 18). PO Herbert did not see where PO Burgos's punched [redacted] PO Herbert did not recall punching [redacted] PO Herbert did not recall using any other force against [redacted] while he was on the ground. PO Herbert was shown a copy of his handwritten TRI report (Board Review 25) from this incident. PO Herbert acknowledged that the TRI report noted he used hand strikes against [redacted] PO Herbert stated that if the report noted such, then at some point in [redacted]'s physical apprehension he used hand strikes against him, but he did not recall when he did so specifically. PO Herbert's acknowledgment of such was based upon reviewing the TRI report, as he had no independent recollection otherwise.

In PO Burgos's body-worn camera video footage (Board Review 07), after PO Burgos tasered [redacted] both officers continued to command [redacted] to place his hands behind his back as [redacted] asks the officers for help. Approximately five seconds after issuing him commands, PO Burgos punches [redacted] For approximately another five seconds, both officers issue commands to [redacted] to place his hands behind his back. PO Herbert then punches [redacted] some more. For approximately 20 seconds, both officers continue to wrestle with [redacted] and issue him commands while alternating punches. How many times each officer punches him is unclear, as is what [redacted] does physically at that time of the punches.

In PO Burgos's body-worn camera video footage (Board Review 08), after the officers punch [redacted] and issue him commands to place his hands behind his back, PO Burgos taseres [redacted] As the footage begins, PO Burgos's taser can be heard activating (beeping); approximately nine seconds later the taser is silent. The officers continue to wrestle with [redacted] on the ground for approximately eight more seconds, and PO Burgos states, "I got one cuff on him." What [redacted] does and what the officers do for that duration of time is unclear. At approximately 17 seconds into the video footage, PO Burgos handcuffs [redacted]'s left wrist. Contemporaneously, a 911 dispatcher calls Unit 1D and PO Herbert requests one additional unit to the location. The officers continue to wrestle with [redacted] on the ground for approximately four more seconds. For approximately six seconds, PO Burgos and PO Herbert punch [redacted] while issuing him commands to place his hands behind his back. How many hand strikes the officers use is unclear, as is what [redacted] is doing physically at that point in time. The officers continue to issue commands to [redacted] which entail profanity. In the span of approximately eight seconds, more officers respond to the scene and [redacted] is

successfully handcuffed. PO Burgos then calls a 911 dispatcher and states no further units are needed.

Both PO Burgos's and PO Herbert's Threat Resistance and Injury Reports are consistent with their testimony (Board Review 24) (Board Review 25).

The Investigating Supervisor's Assessment Report for this incident is consistent with the officers' testimony (Board Review 41). However, the report notes that the body-worn camera video footage is difficult to review clearly, and that despite concluding the officers' usage of force was in compliance with Department regulations, further review is recommended to another investigative unit of the Internal Affairs Bureau.

Patrol Guide Procedure 221-01 regarding Force Guidelines (Board Review 13), states, "MOS will use only the reasonable force necessary to gain control or custody of a subject."

Because body-worn camera video footage captured both officers punching § 87(2)(b) the investigation is crediting that this happened.

§ 87(2)(g)

Allegation N: Discourtesy: Police Officer Dennis Burgos spoke discourteously to § 87(2)(b)

Allegation O: Discourtesy: Police Officer Hugh Herbert spoke discourteously to § 87(2)(b)

Allegation P: Discourtesy: Officers spoke discourteously to § 87(2)(b)

It is undisputed that PO Burgos spoke discourteously to § 87(2)(b)

It is undisputed that PO Herbert spoke discourteously to § 87(2)(b)

It is undisputed that officers spoke discourteously to § 87(2)(b)

In PO Burgos's statement to the CCRB (Board Review 17), PO Herbert called for backup during § 87(2)(b)'s physical apprehension, but PO Burgos did not recall at what point in time. As PO Burgos handcuffed § 87(2)(b)'s second wrist, officers responded to the location. Approximately eight to ten uniformed officers responded, all from PO Burgos's command; however, PO Burgos did not recall who responded specifically. PO Burgos and PO Herbert then safeguarded § 87(2)(b) while awaiting Emergency Medical Services. PO Burgos did not recall anything else happening on scene post § 87(2)(b)'s apprehension.

PO Burgos acknowledged directing profanity at § 87(2)(b) after successfully handcuffing him. PO Burgos stated, "Shut the fuck up," to § 87(2)(b) multiple times. PO Burgos did not recall why he told § 87(2)(b) to, "Shut the fuck up." When asked if there was a

law enforcement purpose for stating such to § 87(2)(b) PO Burgos stated there was not. PO Burgos did not recall what § 87(2)(b) was stating at the time that PO Burgos told him to, “Shut the fuck up.” PO Herbert also directed profanity at § 87(2)(b) after successfully handcuffing him; however, PO Burgos did not recall what PO Herbert stated specifically. PO Burgos was shown his body-worn camera video footage (Board Review 29), and he stated that based on the video footage, both he and PO Herbert directed profanity at § 87(2)(b) at that point in time. PO Burgos recalled stating, “That was the actual taser—when I shoved it in your ass,” to § 87(2)(b). When asked why he stated such to § 87(2)(b) PO Burgos stated § 87(2)(b) had stated PO Burgos had “tased his colon.” When asked if the statement served a law enforcement purpose or whether PO Burgos was attempting to achieve anything by making said statement, PO Burgos stated the statement was a reaction only. PO Burgos did not know if other officers directed profanity at § 87(2)(b) after he had been successfully handcuffed.

PO Herbert provided a generally consistent statement with PO Burgos (Board Review 18). PO Herbert called for backup after taking § 87(2)(b) to the ground, but did not recall when specifically. Additional units responded to the location, but PO Herbert did not recall if they responded after or before § 87(2)(b) had been successfully handcuffed. PO Herbert did not recall how many units responded to the location. PO Herbert did not know if all the units who responded were from his command. PO Herbert did not recall the names of any of the responding officers. When asked if he directed profanity towards § 87(2)(b) after he had been successfully handcuffed, PO Herbert stated he was unsure of the timeline regarding his profanity usage. PO Herbert did not recall directing any other profanity at § 87(2)(b). PO Herbert did not recall whether PO Burgos directed profanity towards § 87(2)(b) after he had been successfully handcuffed. PO Herbert did not recall any other officer directing profanity after he had been successfully handcuffed.

In PO Burgos’s body-worn camera video footage (Board Review 09), approximately three to four officers respond to the scene and aid PO Burgos and PO Herbert in successfully handcuffing § 87(2)(b). How many officers respond in total to the location is unclear. Over the course of approximately eight minutes, both PO Burgos and PO Herbert direct profanity at § 87(2)(b) stating, “Shut the fuck up,” “Stop fucking moving—Don’t fucking move,” “Shut your fucking mouth,” “I don’t give a fuck,” “Keep your fucking head down,” and “That was the actual taser—when I shoved it in your ass.” Other officers on scene also direct profanity at § 87(2)(b) stating, “Shut the fuck up, dickhead,” and “Shut the fuck up.” The identity of these officers is unclear.

According to the resource log for this incident (Board Review 40), the following MOS responded to the location: Police Officer Michael Reyes, Police Officer Benedict Vultaggio, Police Officer Patrick Venetk, Police Officer Monika Washack, Police officer Nick Giakoumis, Sergeant David Ho.

According to the body-worn camera video footage request for this incident (Board Review 39), the following MOS captured footage at the location: Police Officer Ryan Logan, Police Officer Peter Wong, Police Officer Vincent Mekeon, Police officer Patrick Hastings, and Police Officer Benedict Vultaggio.

Because PO Burgos stated that both he and PO Herbert directed profanity at § 87(2)(b) and body-worn camera video footage corroborated such, the investigation is crediting that this happened.

§ 87(2)(g)

§ 87(2)(g)

Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party (Board Review 19).
- PO Herbert has been a member of service for 16 years and has been a subject in 14 complaints and 32 allegations, 25 of which were not substantiated and seven of which are pending investigation. § 87(2)(g)
- PO Burgos has been a member of service for seven years and has been a subject in three complaints and four allegations, of which one was substantiated.
 - 201507511 involved a substantiated allegation of abuse of authority-other (arrest) against PO Burgos. The Board recommended formalized training and the NYPD imposed formalized training.
 - § 87(2)(g)

Mediation, Civil and Criminal Histories

- This complaint was not suitable for mediation.
- As March 20, 2019, the New York City Office of the Comptroller's has no record of a notice of claim in regards to this complaint (Board Review 20).
- § 87(2)(b), § 87(2)(c)

Squad No.: _____

Investigator:	_____	_____	_____
	Signature	Print Title & Name	Date

Squad Leader:	_____	_____	_____
	Signature	Print Title & Name	Date

Reviewer:	_____	_____	_____
	Signature	Print Title & Name	Date